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September 24, 1997

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

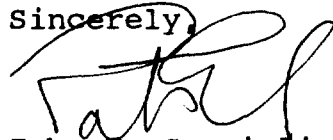
Re: Reply to Opposition to  
Petition for Reconsideration  
Amendment of Section 73.202(b),  
FM Broadcast Stations  
(Mt. Juliet and Belle Meade, Tennessee)  
MM Docket No. 97-97; RM-9047

Dear Mr. Caton:

Transmitted herewith on behalf of The Cromwell Group, Inc. is an original and four copies of its reply to the September 12, 1997 Opposition to Petition for Reconsideration filed by Mt. Juliet Broadcasting, Inc. concerning the Commission's Report and Order in the above-referenced rule making proceeding, released July 25, 1997.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,



John F. Garziglia  
Patricia M. Chuh

Enclosure

cc: Edward W. Hummers, Jr., Esq.  
John L. Tierney, Esq.  
Mr. David J. Waynick

Handwritten initials "D24" and a signature.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

SEP 24 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b) ) MM Docket No. 97-97  
Table of Allotments ) RM-9047  
FM Broadcast Stations )  
(Mt. Juliet and Belle Meade, Tennessee) )

To: Chief, Policy and Rules Division/Allocations Branch

**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**

The Cromwell Group, Inc. ("Cromwell"), by its attorneys, hereby submits its reply to the September 12, 1997 Opposition to Petition for Reconsideration filed by Mt. Juliet Broadcasting, Inc. ("MJB") concerning the Commission's Report and Order, MM Docket No. 97-97, DA 97-1559, released July 25, 1997, reallocating Channel 294A from Mt. Juliet to Belle Meade, Tennessee in the above-referenced rule making proceeding ("Report and Order"), pursuant to the Commission's Public Notice Report No. 2221, released August 27, 1997.<sup>1/</sup> In support whereof, the following is respectfully submitted:

**Background**

1. The above-referenced rule making proceeding was initiated by a Petition for Rule Making and Request for Modification of Authorization filed by Mt. Juliet Broadcasting, Inc. ("MJB"),

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<sup>1/</sup> The instant Reply to Opposition to Petition for Reconsideration is timely filed pursuant to Public Notice Report No. 2221, released August 27, 1997, which established that a reply must be filed within 10 days after the time for filing oppositions has expired (or September 24, 1997). In the instant case, the deadline for filing oppositions was September 11, 1997 (15 days of the date of public notice of the petition for reconsideration). Id.

the permittee of station WNPL(FM), Channel 294A, Mt. Juliet, Tennessee ("WNPL"), on February 21, 1997. MJBFI sought to reallocate Channel 294A from Mt. Juliet, Tennessee to Belle Meade, Tennessee and to ultimately modify the WNPL construction permit to specify operation on Channel 294A at Belle Meade, Tennessee.

2. On March 21, 1997, the Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on MJBFI's proposed allotment plan. In its NPRM, the Commission established May 12, 1997 as the deadline for filing comments and May 27, 1997 as the deadline for reply comments. MJBFI, Great Southern Broadcasting Company, Inc. and Mr. David J. Waynick timely filed comments. Cromwell filed its Comments and Motion for Acceptance of Late-Filed Comments on July 21, 1997.

3. On July 25, 1997, however, the Mass Media Bureau released the Report and Order, reallocating Channel 294A from Mt. Juliet to Belle Meade, Tennessee and modified MJBFI's construction permit to specify Belle Meade as the community of license. Cromwell timely filed the instant petition for reconsideration with the Commission on August 12, 1997 requesting reconsideration and presenting controlling authority concerning technically defective allotments.

#### **Argument**

4. Cromwell's Petition for Reconsideration is proper, contrary to MJBFI's assertions. Section 1.429(b)(3) of the Commission's Rules specifically states that the Commission may grant a petition for reconsideration if it "determines that consider-

ation of the facts relied on is required in the public interest." In this case, it is clear that reconsideration is required in the public interest. The Commission made its decision to reallocate Channel 294A from Mt. Juliet to Belle Meade, Tennessee and to modify WNPL's construction permit to specify Belle Meade as its community of license in this proceeding without the benefit of controlling and dispositive authority. There was absolutely no mention or discussion of the Commission's controlling authority by either MJBFI or those filing comments in this proceeding. The Commission's Report and Order, as it stands, does not allow other potential applicants, who may be able to better serve the public interest, from applying for Channel 294A at Belle Meade, Tennessee.

5. Controlling Commission authority holds that the deletion of a channel is appropriate when there is no available site in compliance with the Commission's technical allotment requirements. This controlling authority is enunciated in San Clemente, California, 10 FCC Rcd 8291 (1995). While MJBFI submits a Bureau decision [Sanibel and San Carlos Park, Florida, 10 FCC Rcd 7215 (MMB 1995)] as authority, that case is not controlling here as it was a Mass Media Bureau decision. Further, the Bureau in Sanibel and San Carlos Park, Florida did not purport to, and indeed, could not overrule the controlling authority contained in San Clemente, California. Simply put, the Channel 294A Mt. Juliet, Tennessee construction permit was granted to MJBFI on the premise that a technically acceptable transmitter site existed from which

the facility may operate. Now that MJBFI has categorically represented to the Commission that no such technically acceptable transmitter site exists, the Commission has no choice but to delete the Mt. Juliet allotment. With the deletion of the Mt. Juliet allotment, the construction permit granted to MJBFI for Channel 294A at Mt. Juliet will be void as an essential condition in the grant of the construction permit -- that of FAA approval - - was never obtained.

6. After the deletion of Channel 294A from Mt. Juliet, the Commission may very well wish to entertain a rule making proposal to allot Channel 294A to Belle Meade, Tennessee. Under established procedures, however, the allotment of Channel 294A to Belle Meade, Tennessee should result in the opening of a filing window in which any interested applicant may apply. It is contrary to the Commission's rules and policies, and indeed is the ultimate in bootstrapping, for MJBFI, who cannot construct a technically feasible facility to serve Mt. Juliet, to come in and claim that the allotment is defective but that it should be allowed to essentially reapply with cut-off protection for Belle Meade, Tennessee.

7. MJBFI must be held to the statements it made to the Commission. MJBFI has categorically stated that the allotment of Channel 294A at Belle Meade is a defective allotment. Under those circumstances, deletion of the allotment is the established Commission procedure and indeed the only fair process the Commission may follow. Otherwise, applicants will be encouraged to

advance the allotment of, apply for and receive construction permits for defective allotments knowing they cannot be operated, but knowing further that the Commission will, upon the discovery of the defective allotment, allow the applicant to continue its quest for a facility with cut-off protection at a new more desirable community.

8. Conclusion. For the foregoing reasons, the Commission should reconsider its decision in Report and Order, DA 97-1559, released July 25, 1997, and delete the allotment of Channel 294A to Mt. Juliet, Tennessee reallotting Channel 294A from Mt. Juliet to Belle Meade, Tennessee.

Respectfully submitted,

THE CROMWELL GROUP, INC.

By:



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Its Attorneys

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September 24, 1997

**CERTIFICATE OF SERVICE**

I, Cassandra L. Davis, a secretary in the law firm of Pepper & Corazzini, L.L.P., certify that true copies of the foregoing Reply to Opposition to Petition for Reconsideration were mailed on this 24th day of September, 1997 to the following by first class mail, postage prepaid.

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